No. 71.

In the Supreme Court of the United States

OCTOBER TERM, 1949.

FEDERAL POWER COMMISSION,
Petitioner,

vs.

THE EAST OHIO GAS COMPANY,
STATE OF OHIO,
THE PUBLIC UTILITIES COMMISSION OF OHIO,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

PETITION FOR REHEARING BY THE STATE OF OHIO and THE PUBLIC UTILITIES COMMISSION OF OHIO.

HERBERT S. DUFFY,
Attorney General of Ohio,
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HAROLD L. MASON, *Chairman,*
HARRY M. MILLER, *Commissioner and Former Chairman,*
RAY O. MARTIN, *Commissioner,*
The Public Utilities Commission of Ohio,
Of Counsel.

January, 1950.

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To the Honorable the Justices of the Supreme Court of the United States:

The State of Ohio and The Public Utilities Commission of Ohio, respondents herein, present this petition for a rehearing because the Opinion of the Court herein, if unaltered, will destroy effective State regulation of Ohio natural gas distributing companies.

A. THE UNFORTUNATE EFFECT OF THE OPINION HEREIN ON OHIO REGULATION OF NATURAL GAS RETAILING COMPANIES.

1. Before the Opinion of the Court herein was issued it was long settled, in practice and in law, that Ohio had complete rate and other regulatory jurisdiction over all

THE EAST OHIO GAS CO.

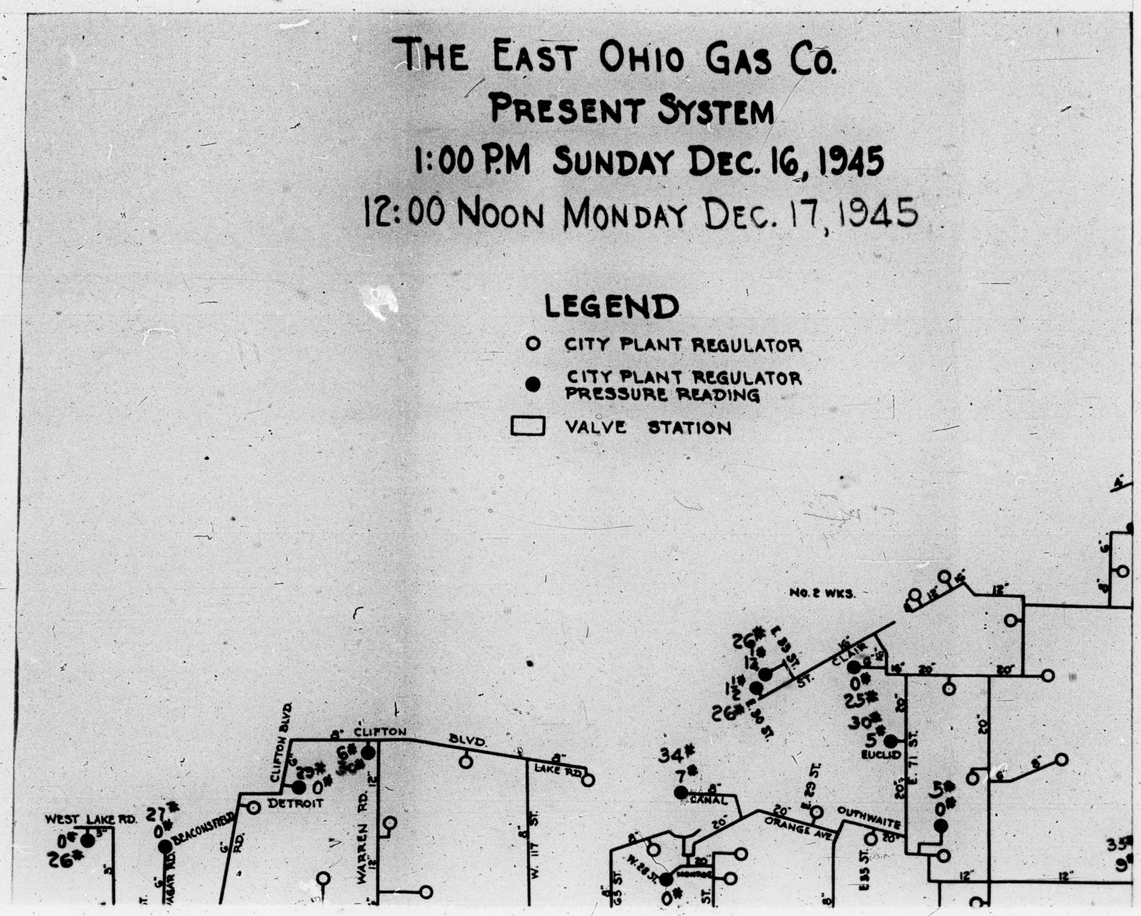
PRESENT SYSTEM

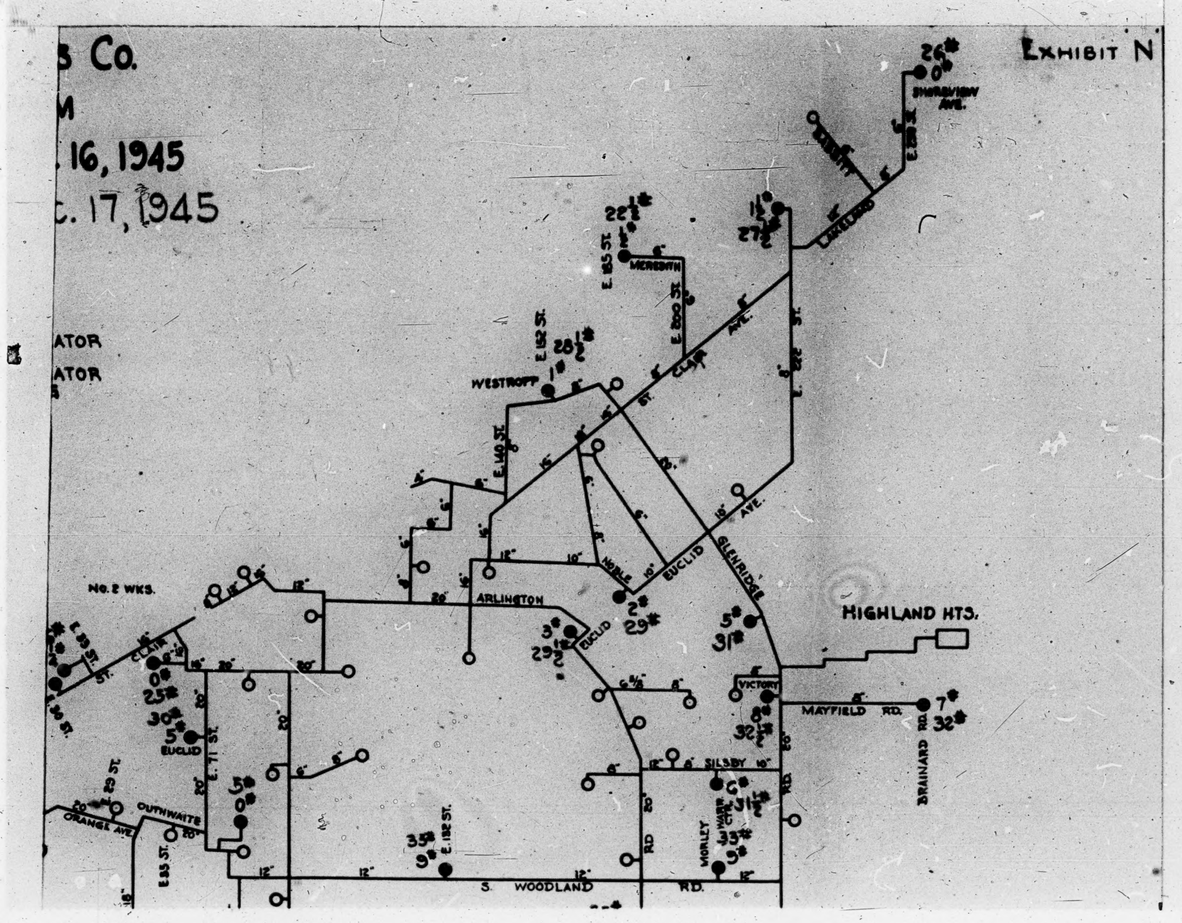
1:00 P.M SUNDAY DEC. 16, 1945

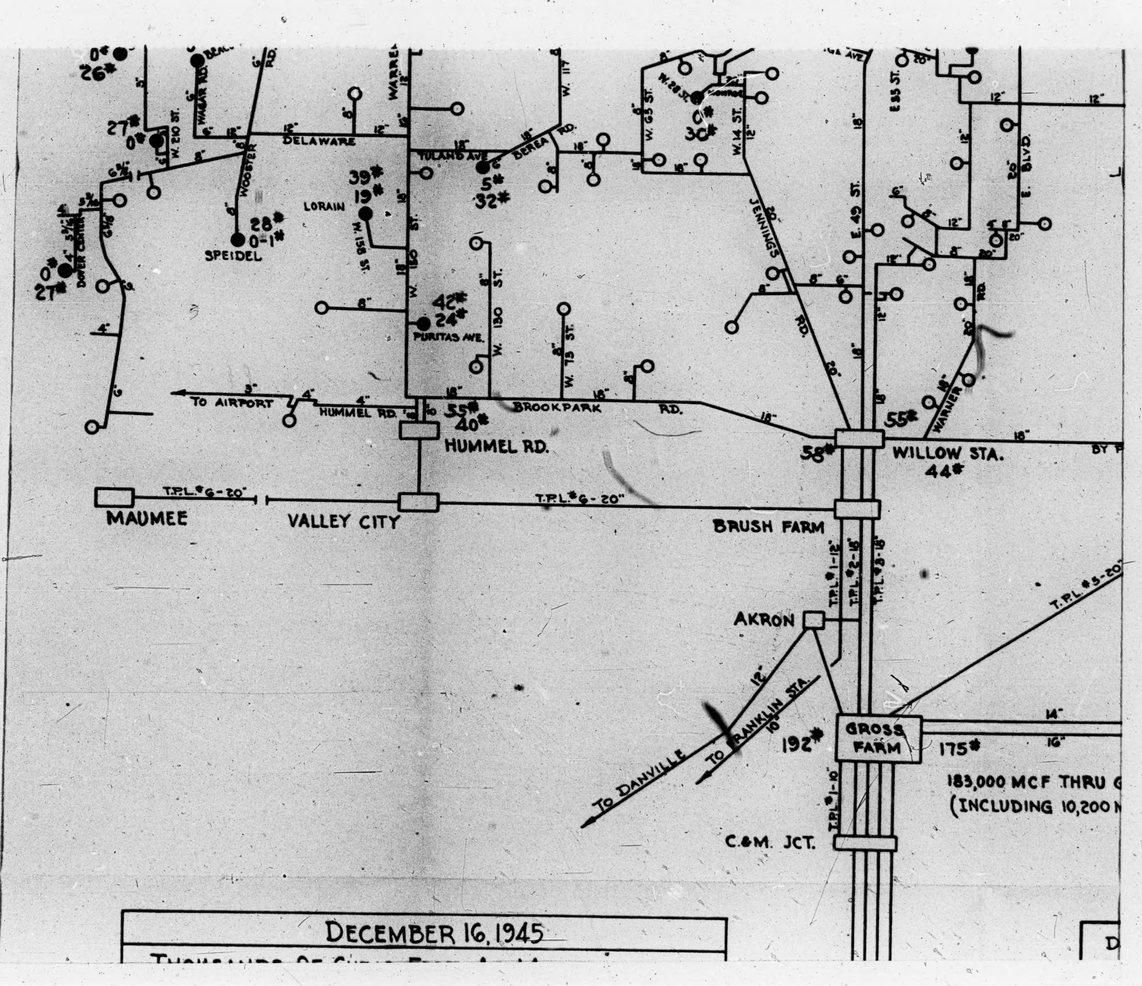
12:00 NOON MONDAY DEC. 17, 1945

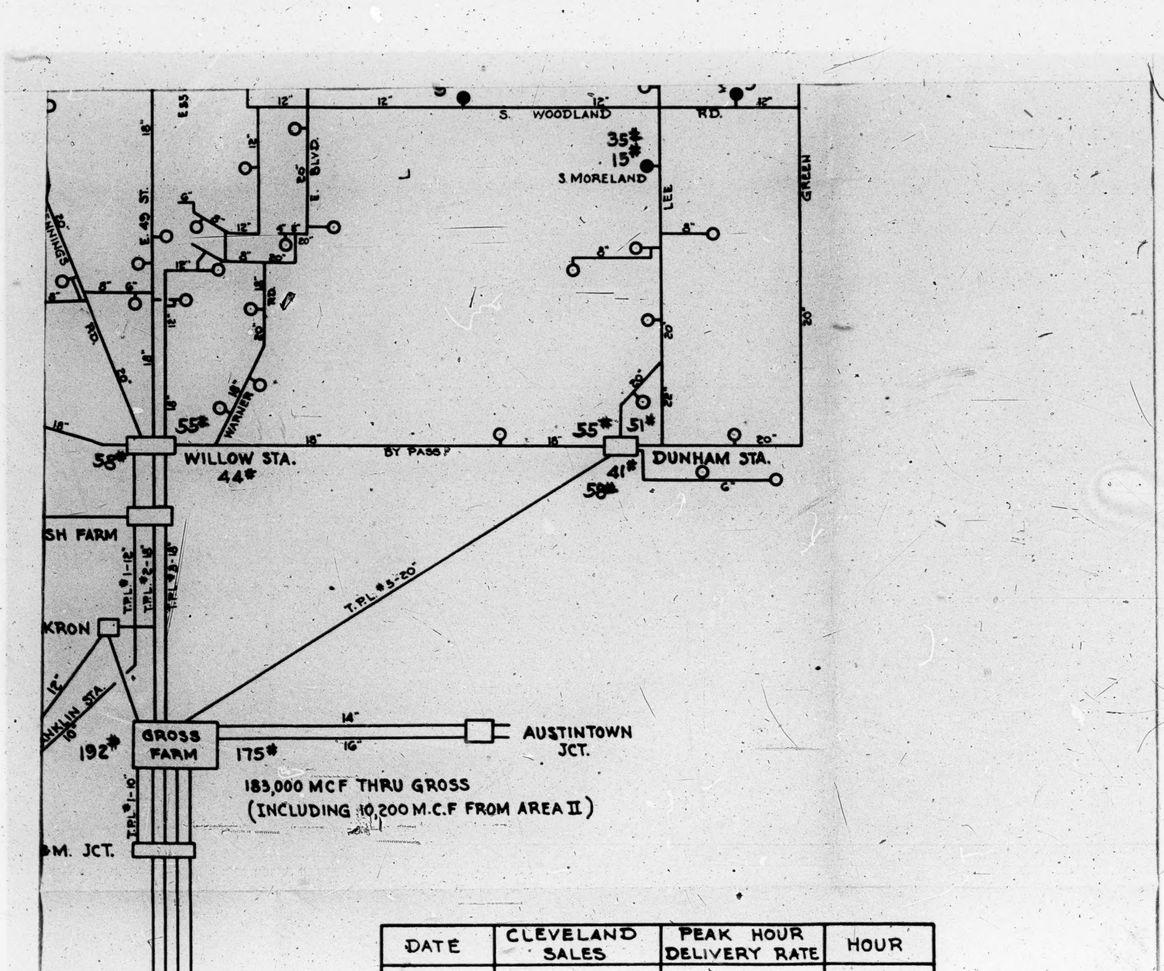
LEGEND

- ○ CITY PLANT REGULATOR
- ● CITY PLANT REGULATOR PRESSURE READING
- ▭ VALVE STATION

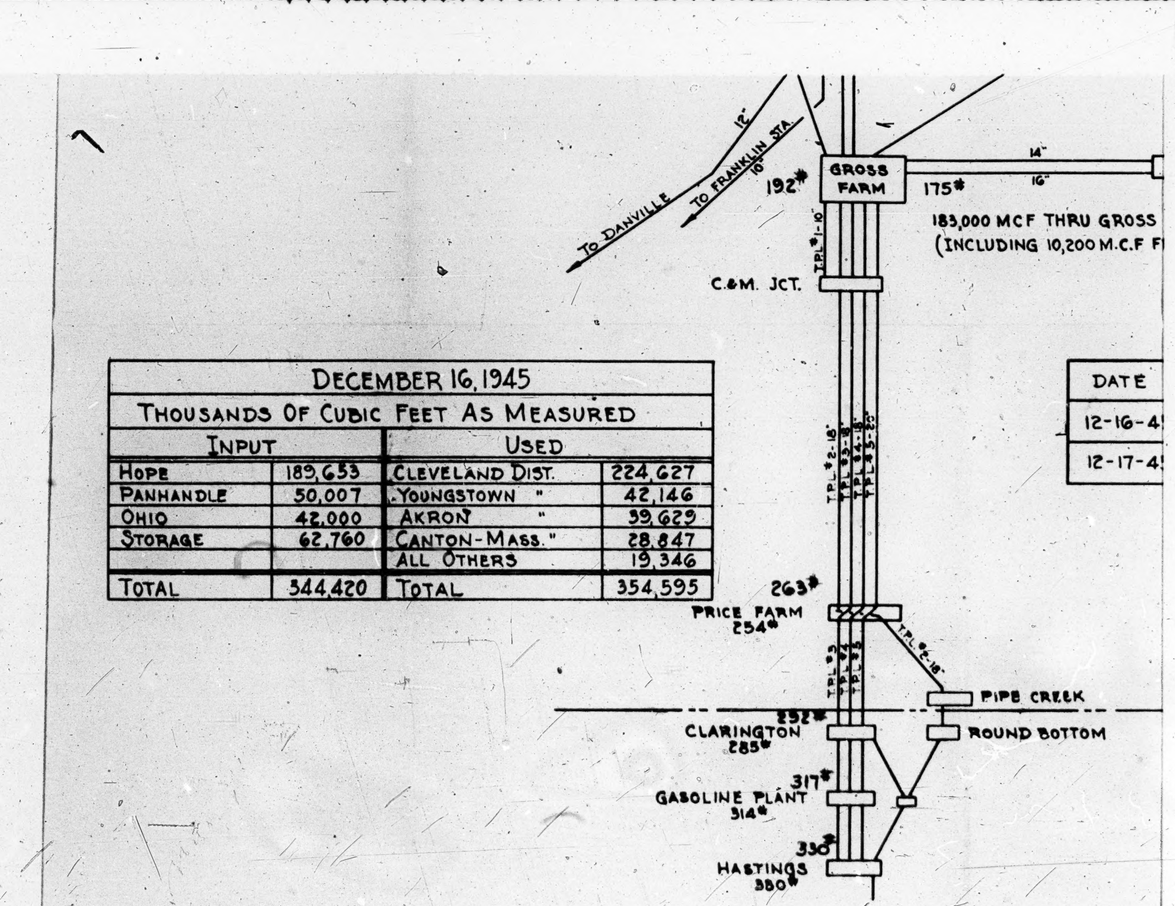




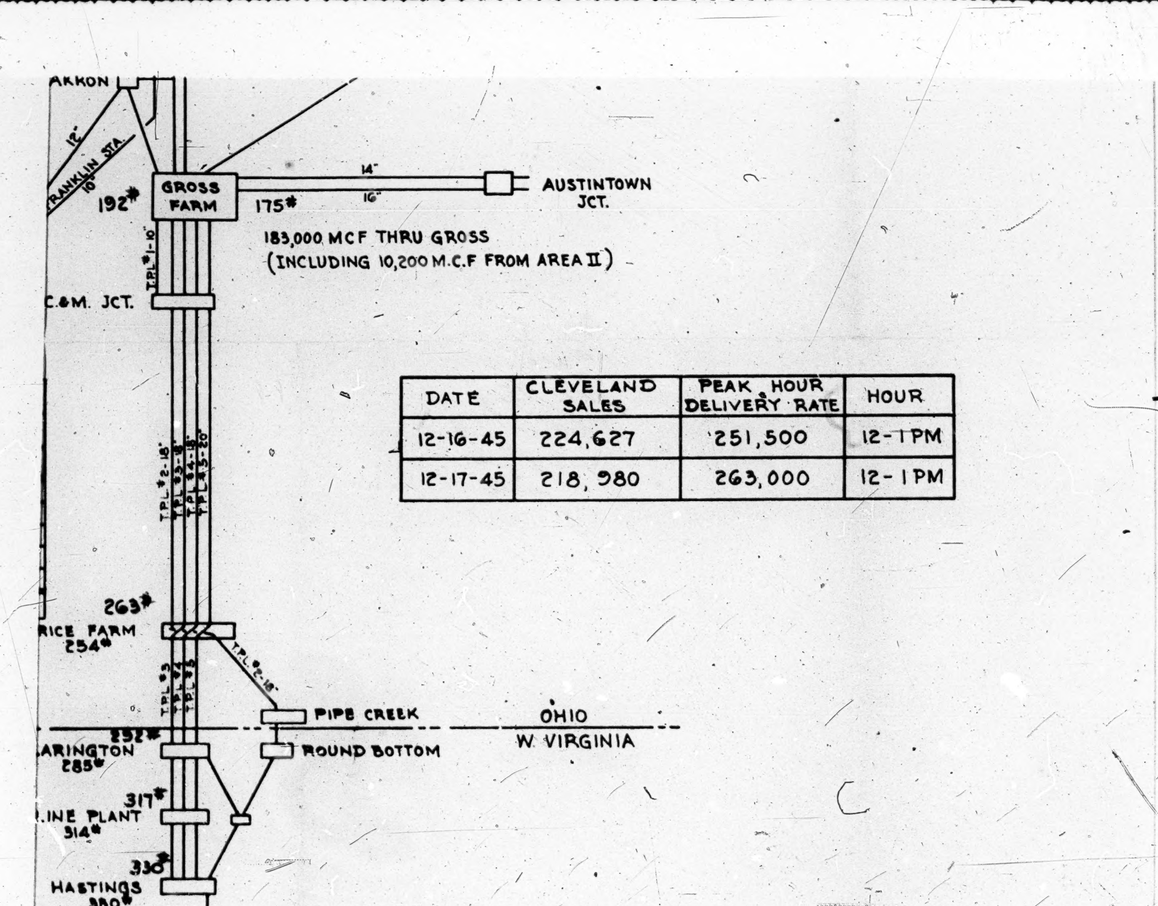




DECEMBER 16, 1945			
THOUSANDS OF CUBIC FEET AS MEASURED			
INPUT		USED	
HOPE	189,653	CLEVELAND DIST.	224,627
PANHANDLE	50,007	YOUNGSTOWN "	42,146
OHIO	42,000	AKRON "	39,629
STORAGE	62,760	CANTON-MASS."	28,847
		ALL OTHERS	19,346
TOTAL	344,420	TOTAL	354,595



DATE	CLEVELAND SALES	PEAK HOUR DELIVERY RATE	HOUR
12-16-45	224,627	251,500	12-1PM
12-17-45	218,980	263,000	12-1PM



purely retail distributing companies in Ohio, including East Ohio. By a stroke of the pen this is all changed. Ohio and the Ohio Commission are now advised by the Court that:

> "the national commerce power *alone* covered the high-pressure trunk lines to the point where pressure was reduced and the gas entered local mains, while the state *alone* could regulate the gas after it entered those mains." (Italics here and later ours.)
>
> "Under these decisions state regulatory power could not reach high-pressure trunk lines * * *."

and that the Federal Power Commission now has sole regulatory power over high-pressure trunk lines because:

> "Here as elsewhere, once a company is properly found to be a 'natural gas company,' no state can interfere with federal regulation."

Obviously one party or another—in every rate or other regulatory proceeding before us from now on—will cite these rulings to deny our Ohio jurisdiction and deny the applicability of Ohio law to all high-pressure lines of retail distributing companies purchasing out-of-state gas. And this means substantially all companies in Ohio. More than this, these rulings will deny our Ohio jurisdiction and law over much of the other property of our Ohio companies. In a company serving several communities, as most of our companies do, much property is jointly used in connection with the operation of both high and low pressure lines—office buildings, warehouses and yards, telephone systems, trucks, garages, laboratories and the like.

By the Opinion our present right to regulate service from and extensions of high-pressure lines in Ohio is declared to be ended. Before any of our Ohio companies can add a foot of pipe to these lines, or undertake to serve an additional community or suburban area, or install an additional compressor station, or drill an additional storage well, or purchase an additional lease for gas storage pur-

poses, or add an additional garage or office building, they must run to the Federal Power Commission in Washington for permission. We are denied, and our Ohio cities are denied, any right to supervise or contract with respect to these purely local matters. And our Ohio consumers must bear all the additional expense of getting federal approval for what we in Ohio know must be done anyhow if our citizens are not to suffer.

When it comes to rate regulation the Opinion's novel view of the language and purpose of the Natural Gas Act and the extent of exclusive federal power creates chaos. *A regulatory gap is created where none ever existed before.*

We who have had practical experience know that whatever party can see some advantage therefrom will urge upon us that the valuation and expense theories of the Federal Power Commission *must* be controlling upon us in respect of much of every retail company's property in connection with our regulation of local distribution rates. Under Section 5(b) of the Natural Gas Act the Federal Power Commission "*may*," and only when "it can do so without prejudice to the efficient and proper conduct of its affairs," "investigate and determine the cost of the * * * transportation of natural gas by a natural-gas company" where it has no authority to establish rates. Suppose it doesn't do so, or it delays for years in doing so (and the present log jam before the Federal Power Commission indicates that this is a very practical problem), are we to cease functioning in Ohio or to guess at the applicable Federal Power Commission principles in reaching our determinations?

If we accept a Federal Power Commission cost finding, as the Opinion seems to require, we will be met with the argument that our rate decision is based on an *ex parte* proceeding. If we make our own determination we will be met with the argument that we have misapplied federal law. There will not be a single gas distribution rate case before

us henceforth in which it will not be urged that a federal question is presented. Thus Section 5(b) becomes, not an aid to effective State regulation as intended by Congress, but its obstructor and destroyer. We are denied jurisdiction, but the Federal Power Commission may or may not exercise its exclusive power. Ohio is put at the mercy of all of the Federal Power Commission's other business.

Rate litigation which we have managed in recent years in Ohio to determine expeditiously and on well established principles of statutory and common law will henceforth be endless, confusing and extremely costly, all to the detriment of Ohio gas rates and service.

2. We are now advised by the Opinion, contrary to the practicalities of the gas industry, to universal practice and to settled law before the Opinion, that:

> "states could regulate interstate gas *only* after it was reduced in pressure and entered a local distribution system."

and that here is the limit of Ohio's authority *today* under the Natural Gas Act.

We most respectfully submit that the Court's apparent conception that there is a clearly defined point on the lines of each local distributing company where gas is reduced in pressure and enters a "local distribution system" is one that seems as if it must logically be so, but in fact is not.

Our Ohio retail companies in purchasing gas wholesale from interstate pipe line companies buy this gas at connections with the interstate lines at anywhere from 50 to well over 1,000 pounds pressure. Whatever the purchase pressure, by the time gas reaches the consumer its pressure is from 4 to 6 ounces. This, however, is accomplished gradually and by many steps. Depending upon the length of the connecting line or lines—the stub lines—a substantial reduction in pressure gradually occurs by the

time these lines connect with others which spread the gas through a larger area. That is merely a law of physics. In the case of East Ohio these other lines are called intermediate high-pressure lines. In a footnote in the Federal Power Commission's brief, page 7, the impression is given that these encircle each city. Actually they both encircle and interlace city streets (R. 65) and connect with numerous other lines of successively smaller sizes which ultimately branch out into the service lines to each customer where the pressure becomes 4 to 6 ounces (R. 66). Had we understood that the Court would be interested in gas mechanics we would have called its attention to a diagrammatic map in the record (Exhibit "N" to application in Docket No. G-695, Tr. Vol. II, p. 242, Tr. Vol. IX, p. 3316). It was not printed but a copy is attached. It shows this intermediate high-pressure system as running through the streets and elsewhere in the Cleveland area and the pressures on a day of shortages of gas in Cleveland as well as on the following day (Tr. Vol. II, pp. 246-248). Of course to practical regulatory authorities the mechanics and successive pressures resulting from the movement of gas through a system have heretofore had no practical or legal consequences.

The confusion explained in Item 1 above which will result in Ohio gas regulation because of the Opinion becomes worse when the question arises, as it will arise in every gas rate proceeding before us from now on, as to how far exclusive Federal Power Commission jurisdiction extends. Does it run through city streets to the point where the intermediate high-pressure lines connect with the large size distribution mains, or does it stop somewhere prior to that point? In the less complicated local distribution systems where the stub lines connect at various points within and without a city with the larger sized local mains, does it run to where these larger local mains are in turn connected with lines running up the side streets, or where?

There simply is no one undebatable point on each local system where gas is "reduced in pressure" and "enters a local distribution system."

3. The effects of the Opinion which will so unfortunately follow in Ohio and elsewhere in the future are the very effects which Ohio and other States were constantly assured during the Congressional hearings would not happen under the Natural Gas Act. They are the effects also, with other needless regulatory duplication and expense, which the States were assured by all prior decisions of this Court were not intended by the Natural Gas Act and would not be permitted by this Court—despite the zeal of the Federal Power Commission to extend its partial authority over the natural gas industry into substantially complete authority.

B. SETTLED PRINCIPLES DISREGARDED IN THE COURT'S OPINION.

We most respectfully submit that the distressing practical effects of the Opinion to which we referred have resulted from disregarding at least the following principles which seem to us to have heretofore been definitely settled by this Court:

1. That there are three areas of federal and State jurisdiction—exclusively State, concurrently State and federal, and exclusively federal (see Ribble, *State and National Power over Commerce* (1936)). As we read the Opinion, the concurrent jurisdiction under which Ohio and other States have for many years successfully regulated local retail companies such as East Ohio, whatever the movement of the gas, is eliminated.

2. That the *Cooley* formula rather than a mechanical test is to determine areas of federal and State power. As

shown by *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23 (1920), the *Cooley* formula was law in the natural gas industry prior to 1938 as well as now.

3. That where the Congressional history of legislation establishes beyond question a definite purpose and intent, as in the case of the Natural Gas Act to supplement and not usurp State power, that intent is to be given effect in interpreting the Act.

In this connection we think a most significant point, perhaps overlooked by the Court, is that nowhere in the long history of the progress of the Natural Gas Act through Congress did any one on behalf of the Federal Power Commission, or any other proponent, point out that the Federal Power Commission would be given controlling federal regulatory authority over substantially all of the natural gas retail distributing companies in the United States.

4. That this Court will not interpret a federal act to read in a manner expressly rejected by Congress in the course of consideration of the legislation.

In this connection we point out that the Opinion as related to the transportation of natural gas in interstate commerce reaches the precise result that would have been reached under Section 1(b) of H. R. 11662, 74th Cong., 2d Sess. (1936), which read:

> "§ (b). *The provisions of this Act shall apply to the transportation of natural gas in high-pressure mains* in interstate commerce and to natural-gas companies engaged in such transportation, but *shall not apply to the distribution of natural gas moving locally in low-pressure mains* or to the facilities used for such distribution or to the production of natural gas: Provided, That nothing in this Act shall be construed to authorize the Commission to fix rates or charges for the sale of natural gas distributed locally in low-pressure mains or for the sale of natural gas for industrial use only."

However, the fact is that Congress rejected this provision and its mechanical test of jurisdiction. The Opinion nevertheless adopts it. Section 1(b) of the Natural Gas Act as actually passed used the *Cooley* formula approach. The Opinion rejects it.

5. That "It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." *Market Co. v. Hoffman,* 101 U. S. 112, 115 (1879).

We most respectfully submit that the Opinion gives no effect whatsoever to the exclusion by Section 1(b) of Federal Power Commission jurisdiction over "other transportation"—or to the words in Section 1(b) that the "provisions" of the Act "shall not apply to the local distribution of natural gas or to the facilities used for such distribution." The Federal Power Commission's orders which the Opinion allows to go into effect apply to the very distribution facilities which the Opinion says are solely within State power, to-wit, the "local mains."

CONCLUSION.

We most respectfully urge that this Court should reconsider a decision which puts Ohio and its Commission, and all the other States and their Commissions, in the position of having their heretofore acknowledged regulatory powers over retail distributing companies superseded in substantial part—and obstructed for practical purposes *in toto*—by a reading of the Act which they were assured in Congress was not intended and were assured by prior decisions of this Court had not resulted.

Respectfully submitted,

HERBERT S. DUFFY,
Attorney General of Ohio,

KENNETH B. JOHNSTON,
Assistant Attorney General of Ohio,

Attorneys for Respondents the State of Ohio and The Public Utilities Commission of Ohio.

HAROLD L. MASON, *Chairman,*

HARRY M. MILLER, *Commissioner and Former Chairman,*

RAY O. MARTIN, *Commissioner,*

The Public Utilities Commission of Ohio,
Of Counsel.

Columbus, Ohio,
January, 1950.

CERTIFICATE OF COUNSEL.

I, KENNETH B. JOHNSTON, counsel for the State of Ohio and The Public Utilities Commission of Ohio, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

KENNETH B. JOHNSTON,

Counsel for the State of Ohio and The Public Utilities Commission of Ohio.

January 20, 1950.